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No. 93-1743

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS R. HOSKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause prohibits the Court of Miliary Appeals from remanding a case to a Court of Military Review for reassessment of the sentence.

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OPINIONS BELOW

The order of the United States Court of Military Appeals (Pet. App. 1a) and the opinion of the Army Court of Military Review (Pet. App. 3a-5a) are unreported.

JURISDICTION

The order of the Court of Military Appeals was entered on January 4, 1994. A petition for reconsideration was denied on February 7, 1994. Pet. App. 2a. The petition for a writ of certiorari was filed on May 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Following a general court-martial, petitioner was convicted of premeditated murder in violation of the Uniform Code of Military Justice (UCMJ) Article 118, 10 U.S.C. 918 (1988 & Supp. IV 1992), and was sentenced to a dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to the pay grade of Private E1. The Army Court of Military Review affirmed the findings and sentence. Pet. App. 19a-30a. The Court of Military Appeals set aside the finding of premeditated murder, but it affirmed the specification of unpremeditated murder and remanded the matter to the Court of Military Review for reassessment of petitioner's sentence based on the affirmed findings. *Id.* at 6a-18a. The Court of Military Review reduced the period of confinement to 30 years, *id.* at 3a-5a, and the Court of Military Appeals affirmed that sentence, *id.* at 1a.

1. The evidence at the court martial showed that petitioner and four other members of a military police unit were assigned to guard a shipment of ammunition at a railroad siding near Sythen, Germany. Petitioner and two other members of the detail received authorization to go into town to eat dinner. Contrary to orders, they drank beer with dinner and purchased two bottles of brandy, which they brought back to the guard post and shared with other members of the detail. After drinking, one of the members, Private First Class Haney, began to taunt another member who had become sick. Petitioner told Haney to calm down. They began to argue, and petitioner ultimately pulled out a pistol and shot Haney repeatedly. Haney died from the gunshot wounds. Pet. App. 7a-11a.

2. Petitioner was convicted of premeditated murder and received a sentence that included life imprisonment. See UCMJ Art. 118, 10 U.S.C. 918 (1988 & Supp. IV 1992). Petitioner subsequently requested clemency from the convening authority. See UCMJ Art. 60, 10 U.S.C. 860.[1] He submitted materials to support that request, including letters from four of the six court members who adjudged the findings and sentence in the court-martial. Three of those court members concurred in petitioner's request that the sentence to confinement be reduced to 25 years, while one believed that petitioner should serve only ten years of confinement, "exclusive of parole." See Pet. App. 31a-33a. The convening authority reduced petitioner's sentence to 40 years' confinement, but otherwise approved the adjudged sentence. The Army Court of Military Review affirmed the findings and the modified sentence. *Id.* at 19a-30a.

3. The Court of Military Appeals granted discretionary review. Pet. App. 6a-18a. The court reviewed the evidence and concluded that it was insufficient to sustain petitioner's conviction of premeditated murder. *Id.* at 12a-15a. The court, however, affirmed "this specification to the extent that it alleges unpremeditated murder" and returned the case to the Army Court of Military Review "for reassessment of the sentence based on the affirmed findings." *Id.* at 15a.

The Army Court of Military Review reassessed the sentence on the basis of "the findings affirmed by the

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[1] The "convening authority" is the commander who convenes the court-martial. The convening authority selects the court-martial members (who are analogous to jurors), directs that the accused be tried by the court-martial for the charged offenses, and conducts a post-trial review of the proceedings. See UCMJ Arts. 22-25, 60, 10 U.S.C. 822-825, 860.

United States Court of Military Appeals, the entire record, and *United States* v. *Sales*, 22 M.J. 305 (C.M.A. 1986)." Pet. App. 5a.[2] The court ruled that "only so much of the sentence is affirmed as provides for a dishonorable discharge, confinement for thirty years, forfeiture of all pay and allowances, and reduction to Private E1." *Ibid.* The Court of Military Appeals granted discretionary review of that decision and affirmed the modified sentence. *Id.* at 1a.

ARGUMENT

Petitioner contends that the United States Court of Military Appeals violated his due process rights by remanding petitioner's case to the United States Army Court of Military Review for "reassessment" of petitioner's sentence. According to petitioner, UCMJ Article 67, 10 U.S.C. 867 (Supp. IV 1992), requires the Court of Military Appeals either to order a rehearing on the sentence or to dismiss the charges. Pet. 5.[3]

Petitioner is mistaken at the outset in casting his argument in constitutional terms. Petitioner contends that the Court of Military Appeals has misapplied the federal statute—UCMJ Article 67—that describes that court's authority to review decisions of the Courts of Military Review. As this Court has recently observed, an allegation that the government has failed to comply with statutory requirements generally does not qualify as a "constitutional" claim. *Dalton* v. *Specter*, 114 S. Ct.

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[2] The *Sales* decision specifically recognizes that a Court of Military Review may reassess a sentence. *United States* v. *Sales*, 22 M.J. 305, 307 (C.M.A. 1986). See also *United States* v. *Peoples*, 29 M.J. 426 (C.M.A. 1990).

[3] Petitioner apparently relies on the 1988 version of Article 67. His citations to subsections of that Article accordingly do not correspond to ours.

1719, 1725-1727 (1994). That principle is equally applicable here. The claim in this case, as in *Dalton*, is "a statutory one." *Id.* at 1728.

The Court of Military Appeals acted well within its statutory authority in returning petitioner's case to the Army Court of Military Review for sentence reassessment. Petitioner mistakenly suggests that UCMJ Article 67, 10 U.S.C. 867 (Supp. IV 1992), required the Court of Military Appeals to order a rehearing before a new court-martial. See UCMJ Art. 63, 10 U.S.C. 863 (1988 & Supp. IV 1992) (describing the procedure for rehearings). UCMJ Article 67 does not require that result. UCMJ Article 67(d) provides:

> If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

10 U.S.C. 867(d) (Supp. IV 1992). UCMJ Article 67(d) requires a rehearing only if the Court of Military Appeals sets aside the "the findings and sentence"—*i.e.*, the entire judgment—in a case. In petitioner's case, however, the Court of Military Appeals set aside only the finding of guilt on the charge of premeditated murder and "affirmed as to this specification to the extent that it alleges unpremeditated murder." Pet. App. 15a. UCMJ Article 67(e) is applicable to that situation. It provides in pertinent part:

> After it has acted on a case, the Court of Military Appeals may direct the Judge Advocate General to return the record to the Court of Military Review for

> further review in accordance with the decision of the court.

10 U.S.C. 867(e) (Supp. IV 1992). Thus, UCMJ Article 67(e) expressly allowed the Court of Military Appeals to return petitioner's case to the Court of Military Review for "further review," which in this case entailed "reassessment of the sentence based on the affirmed findings." Pet. App. 15a.

As petitioner acknowledges (Pet. 5), there is no question that the Courts of Military Review may reassess sentences as a part of their statutory power to review sentences as "correct in law and fact" (UCMJ Art. 66(c), 10 U.S.C. 866(c)). This Court specifically recognized the authority of those courts to reassess sentences in *Jackson* v. *Taylor*, 353 U.S. 569 (1957), which—as petitioner concedes (Pet. 8)—presents a situation that is "similar" to this case. Contrary to petitioner's suggestion (*ibid.*), Congress has not made changes to the UCMJ since this Court's decision in *Jackson* that have affected the power of the Court of Military Appeals to return a case to a Court of Military Review for sentence reassessment. Compare 10 U.S.C. 867(d) and (e) (Supp. IV 1992) with 50 U.S.C. 654(e) and (f) (1952).

Petitioner specifically acknowledges that "the Court of Military Appeals has remanded the cases of many military members to the Courts of Military Review for sentence reassessment, and petitioner is unaware of any case in which the practice has been challenged on due process grounds." Pet. 6. See *United States* v. *Salcs*, 22 M.J. 305, 307 (C.M.A. 1986). We submit that the Court of Military Appeals' practice has not been challenged because there is no substantial doubt that the practice is permissible. The Court of Military Appeals did not abuse

its discretion in directing the Court of Military Review to reassess petitioner's sentence. In any event, that exercise of discretion, which is largely a fact-based determination, does not present a question warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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